Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

October Term, 2004

ROBERT A. BURT, ET AL.,

Petitioners,

v.

DONALD H. RUMSFELD, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF DEFENSE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BEFORE JUDGMENT

PETITION FOR WRIT OF CERTIORARI

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April 26, 2005

QUESTIONS PRESENTED FOR REVIEW

Petitioners—a majority of the faculty of the Yale Law School—are plaintiffs in *Burt v. Rumsfeld*, in which the court below held that the Department of Defense's application of the Solomon Amendment, 10 U.S.C. § 983, to coerce petitioners into suspending application of the Yale Law School's nondiscrimination policy to military recruiters violated petitioners' rights under the First Amendment. The questions presented are:

- Whether the Department of Defense ("DOD") violated petitioners' First Amendment rights of freedom of speech by forcing them to assist the DOD in its discriminatory recruitment and employment practices;

- Whether the DOD violated petitioners' First Amendment rights of freedom of speech by forcing them to modify the nondiscrimination policy of the Yale Law School to provide assistance to the DOD's discriminatory recruitment and employment practices;

- Whether the DOD violated petitioners' First Amendment rights of freedom of expressive association by coercing them to assist the DOD in its discriminatory recruitment and employment practices in conflict with the Yale Law School's core principles of equal respect for all their students, regardless of race, ethnicity, religion, gender or sexual orientation;

- Whether the DOD infringed petitioners' constitutionally guaranteed rights of academic freedom by disabling them from protecting Yale law students against the DOD's discriminatory recruitment and employment practices;

- Whether the DOD violated petitioners' First Amendment rights of freedom of association by

coercing them into abandoning their decision to disassociate from, and disapprove, the DOD's discriminatory recruitment and employment practices.

PARTIES TO THE PROCEEDING BELOW

Petitioners, each of whom is a member of the faculty of the Yale Law School, are: Robert A. Burt, Owen M. Fiss, Harold Hongju Koh, Kenji Yoshino, Bruce Ackerman, Anne L. Alstott, Ian Ayres, Jack M. Balkin, Yochai Benkler, Richard R.W. Brooks, Amy L. Chua, Morris L. Cohen, Dennis E. Curtis, Harlon L. Dalton, Drew S. Days III, Brett Dignam, Steven B. Duke, William N. Eskridge, Jr., Daniel C. Esty, Daniel J. Freed, Robert W. Gordon, Michael J. Graetz, Oona A. Hathaway, Dan M. Kahan, Paul W. Kahn, Jay Katz, S. Blair Kaufman, Alvin K. Klevorick, Anthony T. Kronman, Carroll L. Lucht, Daniel Markovits, Jerry L. Mashaw, Jean Koh Peters, Robert C. Post, J.L. Pottenger, Jr., Judith Resnik, Carol M. Rose, Susan Rose-Ackerman, Vicki Schultz, Reva Siegel, John G. Simon, Robert A. Solomon, Stanton Wheeler and Stephen Wizner.

Respondent is Donald H. Rumsfeld, in his official capacity as United States Secretary of Defense.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Robert A. Burt, et al. respectfully pray that a Writ of Certiorari issue pursuant to Supreme Court Rule 11 to review and affirm the Judgment and Opinion of the United States District Court for the District of Connecticut, entered on February 3, 2005.

CITATION TO OPINIONS BELOW

The Ruling of the United States District Court for the District of Connecticut on Petitioners' Summary Judgment motion and Respondent's Motion to Dismiss is reported at 354 F. Supp. 2d 156 (D. Conn. 2005) and annexed hereto as Appendix A, ruling that the Solomon Amendment is declared unconstitutional as applied, and enjoining Respondent from enforcing it against Yale University based on Yale Law

School's Nondiscrimination Policy. Judgment was entered on February 3, 2005, and is annexed hereto as Appendix B. The Ruling of the United States District Court for the District of Connecticut denying Defendant's Rule 12(b)(1) Motion to Dismiss is reported at 322 F. Supp. 2d 189 (D. Conn. 2004) and annexed hereto as Appendix C. Notice of Appeal was filed by Respondent on April 1, 2005, and is annexed hereto as Appendix D.

JURISDICTION

The judgment of the United States District Court for the District of Connecticut was entered on February 3, 2005. A notice of appeal was filed in the United States Court of Appeals for the Second Circuit on April 1, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

STATUTES INVOLVED

The questions presented in this case concern the constitutionality of 10 U.S.C. § 983 (the "Solomon Amendment"), annexed hereto as Appendix E, under the First and Fifth Amendments to the United States Constitution, annexed hereto as Appendix F and Appendix G.

STATEMENT OF THE CASE

Introduction

Petitioners are a majority of the faculty of the Yale Law School. They are also plaintiffs in *Burt v. Rumsfeld*, a case in which the Hon. Janet C. Hall of the United States District Court for the District of Connecticut: (1) granted petitioners' motion for summary judgment; (2) declared the Department of Defenses's ("DOD") application of the

Solomon Amendment (10 U.S.C. § 983) to Yale University unconstitutional; and (3) enjoined the DOD from acting under the Solomon Amendment on its threats to deprive Yale University of some $300,000,000 in annual funding. (App. A3.)

The DOD has wielded these threats in an attempt to coerce petitioners to exempt military recruiters from the Yale Law School's longstanding Nondiscrimination Policy. Since 1978, the Yale Law School has required any employer seeking to use the services of its Career Development Office ("CDO") to pledge not to discriminate against any person on grounds of race, ethnicity, religion, gender or sexual orientation. As a result of the DOD's financial threats, petitioners were forced to exempt military recruiters from their Nondiscrimination Policy in 2002 and to allow the DOD to use the services of CDO in conducting its discriminatory recruiting practices under the auspices of the Law School. On January 31, 2005, Judge Hall found that the DOD's threats of financial reprisal violated petitioners' constitutional rights and enjoined application of the Solomon Amendment to Yale University. (App. A50-59.) The Yale Law School, acting through its Dean, Harold Hongju Koh, has reinstated the Law School's Nondiscrimination Policy.

The DOD has petitioned this Court to grant Certiorari in another case, *Donald H. Rumsfeld et al. v. Forum for Academic and Institutional Rights* (No. 04-1152) (the "*FAIR* case") involving many of the issues raised by Judge Hall's decision below. There has been no final judgment in the *FAIR* case. In that case, the DOD seeks review of the Court of Appeals reversal of a District Court decision to deny the plaintiffs' request for a preliminary injunction. As a result, the FAIR record is not closed and the operative facts remain in flux. In this case, the relevant facts concerning the DOD's application of the Solomon Amendment to the Yale Law School have been established by record evidence.

Moreover, as is evident from the DOD's Petition for Certiorari, the *FAIR* case, brought by an association of law teachers and students from around the country, presents the issues involved abstractly without full development of their factual context. By contrast, the record in this case involves a concrete application of the Solomon Amendment to a university in a factual context within which the effects of the DOD's financial threats on the educational environment and on military recruiting can be realistically assessed.

In both the *FAIR* case and this case, the DOD's original response was to seek dismissal of the cases on the grounds that plaintiffs did not have standing to bring the case and that the DOD's actions were not sufficiently final to present issues ripe for adjudication. In contrast to the *FAIR* case, the petitioners in this case constitute a majority of the Yale Law School faculty and represent the parties invested with the power of decision over the Law School's Nondiscrimination Policy. As a result, considerations of standing or ripeness are less likely in this case to prevent this Court from reaching a substantive decision of the serious constitutional issues raised by the DOD's financial threats against the nation's law schools.

The record in this case also includes an extensive documentary history establishing the DOD's final decision to deprive Yale University of over $300,000,000 unless military recruiters were exempted from the Law School's Nondiscrimination Policy. As a result, considerations of standing or ripeness are less likely to prevent this Court from reaching a substantive decision in this case of the serious constitutional issues raised by the DOD's financial threats against the nation's law schools.

This case also involves more comprehensive development of the constitutional issues raised by the DOD's threats against the nation's universities. Apart from one aspect of the rights of an expressive association, the

arguments in the *FAIR* case are almost exclusively addressed to certain freedom of speech issues. In this case, petitioners have raised not only those issues; they also demonstrate that the DOD's actions constitute an unprecedented invasion of their constitutionally protected rights of academic freedom and their responsibility to protect their students from the commission of discriminatory acts. Petitioners also assert the constitutionally protected right of private associations to disassociate themselves from, and thereby oppose, the discriminatory conduct of the DOD. As a result, Judge Hall's decision presents the full range of constitutional issues raised by the DOD's coercive practices.

In seeking the review of the *FAIR* case at this time, the DOD took the unusual step of asking this Court to review the case before it had reached final judgment. The reason advanced is the perceived urgency of resolving the issues presented. Petitioners respectfully submit that the same considerations which impelled the respondent to seek review of the Third Circuit's preliminary injunction decision in the *FAIR* case support the grant of Certiorari in this case. Since this case involves a carefully reasoned final judgment which is based on a fully developed factual record and since the decision addresses the full scope of relevant constitutional issues, it is actually a more suitable vehicle for this Court's review of these issues, even though the Circuit Court has not yet decided this case.

There is an urgent need for this Court to review this case wholly apart from the considerations advanced by the DOD. This Court's decisions uniformly recognize that infringements of the rights of speech and association inflict irreparable injury. *Virginia v. Am. Booksellers Ass'n , Inc.*, 484 U.S. 383, 393 (1988); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Since 2001, the DOD has moved aggressively to suppress the nation's law schools' opposition to the military's discrimination against gays and lesbians. Although the Yale Law School has been able to free itself

from the DOD's coercive pressures by reason of Judge Hall's protection, the nation's law school community has been disabled from exercising their First Amendment right to oppose the military's discrimination against gays and lesbians. Despite Judge Hall's declaration that the DOD's financial threats violate the Constitution, the DOD has not lifted a finger to relieve the nation's law schools of the financial threats which have caused them to suspend application of their nondiscrimination policies to military recruiters. If, as petitioners believe, Judge Hall is right, this case presents for this Court's review an unconstitutional Act of Congress that punishes speech about issues of vital public concern and reason enough to grant this petition for Certiorari now.

Statement of Facts

Every year, competent and qualified citizens of the United States who wish to volunteer for service in the armed forces are denied the opportunity because of rank discrimination. The military deliberately discriminates against gay, lesbian and bisexual Americans who wish to serve their country. The purported justification for this discrimination, that gays in the military would undermine morale, good order, discipline, and unit cohesion, has no factual or moral basis. Empirical studies by the United States government have proven that the presence of gay troops presents no threat to morale or unit cohesion. Among the members of the North Atlantic Treaty Organization, only the United States, Greece and Turkey continue to discriminate against gay and lesbian members of the armed forces. The European Court of Human Rights has held that excluding gays and lesbians from the military is an unjustifiable deprivation of human rights. *See Lustig-Prean and Becket v. The United Kingdom*, App. Nos. 31417/96, 3277/96 (Eur. Ct. of Human Rights, Third Section, 1994), annexed hereto as Appendix H.

It has long been the position of members of the Yale Law School faculty that prejudice against gays and lesbians, no different from prejudice on the basis of race or religion, has no place in any community, including academic institutions or the workplace, whether civilian or military. The Yale Law School was among the first to extend the protection of its Nondiscrimination Policy to gays and lesbians in 1978.

Petitioners have, for many years, expressed their message of tolerance and equal respect for the dignity of all individuals through a formal written Nondiscrimination Policy, which governs all aspects of the Law School's activities. Petitioners have expressed this message by refusing to associate with any employer, civilian or military, that discriminates against prospective employees on the basis of race, ethnicity, religion, gender or sexual orientation. Every employer seeking to use Law School sponsored recruiting services must sign a pledge subscribing to the Nondiscrimination Policy.

Military recruiters would be welcome to use these services if they abandoned their discriminatory practices. They have refused to do so and were denied such services from 1978 until 2002 when the Yale Law School faculty voted to suspend application of the Law School's Nondiscrimination Policy to military recruiters because of the DOD's financial threats against Yale University.

During the period following the Yale Law School's decision to extend the protection of its Nondiscrimination Policy to gays and lesbians in 1978, many of the nation's law schools adopted similar policies. By the 1990's virtually every law school in the country required employers seeking to use law school recruiting services to pledge to refrain from discrimination because of any prospective employee's sexual orientation. In 1991, the American Association of Law

Schools made such policies a requirement for any law school seeking to join the 166 member Association.

In response to the law schools' growing protest against the military's discrimination against gays and lesbians, Congress enacted the Solomon amendment (10 U.S.C. § 983) in 1994. The Solomon Amendment empowers the Department of Defense to withhold a broad range of federal funding from "institutions of higher education" if the "institution" or any "subelement thereof" has a "policy or practice . . . that either prohibits, or in effect prevents" military recruiters from gaining access to campuses, to students on campuses, or to certain information deemed necessary for recruiting. (App. E1-2).

The legislative history of the Solomon Amendment makes clear that the law was intended to coerce the nation's law schools into abandoning their protest of the military's continuing discrimination against gays and lesbians. Commenting on the increasing use of nondiscrimination pledges by the nation's law schools, Senator Nickles noted that "140 institutions . . . have denied military recruiters access to their campus[es]". 140 Cong. Rec. § 8159-01 (daily ed. July 1, 1994) (statement of Sen. Nickles). Rep. Pombo, a cosponsor of the Solomon Amendment, stated the sponsors' intention to "send a message over the wall of the ivory tower", and to tell universities that "their starry eyed idealism comes with a price". 140 Cong. Rec. H3860-03 (daily ed. May 23, 1994) (statement of Rep. Pombo). Rep. Solomon went on to say that Congress intended to:

> "tell . . . recipients of federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment rights. But do not expect Federal dollars to support your interference with our military recruiters." 140 Cong. Rec.

H3860-03 (daily ed. May 23, 1994) (statement of Rep. Solomon).

Despite the passage of the Solomon Amendment in 1994, the DOD made no effort to terminate federal funding to Yale University, or the many other institutions of higher learning whose law schools had adopted nondiscrimination policies until 2001. The DOD did not invoke its powers under the Solomon Amendment in part because the Yale Law School never "prohibited or in effect prevented" military recruiters from access to their students or the information necessary to recruit them.

An integral part of petitioners' mission as teachers of law is providing assistance to students in developing their legal careers. Petitioners counsel law students and advise them as to the various alternatives for service in the legal profession. Petitioners have organized, and supervise, the Career Development Office ("CDO") of the Law School to assist them in discharging their career guidance responsibilities. The CDO provides individual counseling to students and assistance to graduates, sponsors a speakers' program for alumni and students and conducts skill-building programs. The CDO also organizes and implements a recruiting program for the purpose of enabling students and employers to obtain information about each other.

The CDO organizes interview programs for students and employers in the fall and the spring. These interviews are conducted at a Holiday Inn near, but not on, the Law School campus. Employers seeking to use the services of the CDO must register with the CDO. (App. A16.) Once registered, employers may send information promoting their organizations to the CDO which makes such information available to students on its website. (*Id.*) Students and employers can schedule interviews on line through the CDO's email facilities.

All employers seeking to use the services of the CDO must subscribe to the Law School's Nondiscrimination Policy. Employers are advised:

> "The Yale Law School faculty has adopted the following rules governing access to our career development services:
>
> Yale Law School reaffirms its policy against discriminatory employment practices. The law school does not countenance any form of discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, sexual orientation, or the prejudice of clients. Accordingly, all employers utilizing its placement services are required to abide by this policy. Employers who violate this policy will face sanctions."

It is the official policy of the DOD to discriminate against gays and lesbians. The DOD requires that a member of the armed forces "shall be separated from the armed forces" if "the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts"; . . . "stated that he or she is a homosexual or bisexual"; . . . or "married or attempted to marry a person known to be of the same biological sex". 10 U.S.C. § 654(b). As a result, military recruiters have refused to subscribe to Yale Law School's Nondiscrimination Policy and may not use the services of the CDO. However, the military is not denied access to Yale law students or information necessary to recruit law students.

In recognition of their students' autonomy and their right to seek employment wherever they choose, the Law School provides the DOD with contact information, including students' names, home towns and states, academic

majors and degrees received. (App. A21.) The DOD can gain access to Yale law students' email addresses through the Law School's website. Military recruiters can contact Yale law students directly by email, telephone or mail and provide information concerning available employment opportunities. Military recruiters can reserve rooms at the Holiday Inn used by other employers during the fall or spring interview periods just like any other employer. In addition, the military can arrange to meet with Yale law students at any available space in the Law School at the invitation of any student or student group, to promote the virtues of the armed forces. (App. A20.)

What petitioners withhold from the military are the services of the CDO. Petitioners withhold its services because they do not wish to assist the military in discriminating against their gay and lesbian students. Petitioners withhold these services because they, as teachers, seek to protect their students from discrimination both in the act of recruitment under Law School auspices and in their subsequent employment opportunities. Petitioners withhold these services to send a message to their students, to employers and to the wider community that discrimination against persons based on their sexual orientation is every bit as unjust as discrimination on the basis of race, ethnicity, religion or gender. Petitioners withhold these services in exercise of their constitutionally protected right to disassociate from, and thereby to protest, any employer's discriminatory practices.

During the period from 1978 to 2001, the DOD recruited Yale law students by the means made available to them without complaint. After the passage of the Solomon Amendment in 1994, the DOD occasionally raised questions about the impact of the Nondiscrimination Policy on its access to students, as military recruiting personnel succeeded one another over time. Each time, Law School personnel explained the various ways in which military recruiters could

gain access to Yale law students and military recruiters made use of the access provided for over 20 years without further objection, apparently satisfied that military recruiting requirements were adequately served. (App. A20-21.)

Then in 2001, in an abrupt reversal of policy, the DOD began insisting that military recruiters be provided not only with access to students but also with the services of the CDO in exactly the same manner as provided to employers who subscribed to the Law School's Nondiscrimination Policy. (App. A21.) The DOD insisted that military recruiters be afforded access to students in a manner that is "at least equal in quality and scope" to that offered employers that subscribed to the Nondiscrimination Policy. After protracted correspondence, Acting Deputy Undersecretary of Defense, William S. Carr, sent a letter, dated May 29, 2003, to Yale University President Richard S. Levin and flatly declared that "Yale's policy is in violation of federal law". (App. A23.) The Carr letter objected that petitioners' application of the Nondiscrimination Policy to military recruiters "sends the message that employment in the Armed Forces of the United States is less honorable or desirable . . . ." than employment elsewhere and made clear that the DOD would not be satisfied unless the petitioners abandoned their protest of the military's discrimination against gays and lesbians. (App. A23.)

To avoid depriving their colleagues of some $300,000,000 in annual funding, a majority of the Yale Law School faculty voted to suspend application of the Nondiscrimination Policy to the DOD in the fall of 2002 until such time as a court of law could determine whether the petitioners' constitutional rights had been violated by the DOD's financial threats. The DOD's actions against Yale were part of a nationwide campaign to suppress the nation's law schools' application of their nondiscrimination policies to the military. The DOD succeeded. By 2003, virtually

every law school in the nation had suspended the application of their nondiscrimination policies to military recruiters.

In 2003, the United States District Court for the District of New Jersey in the *FAIR* case ruled that the DOD's insistence that military recruiters be treated in a manner equal in quality and scope to nondiscriminating employers exceeded the authority conferred by the Solomon Amendment. *Forum for Academic & Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269, 321 (D.N.J. 2003). The DOD returned to Congress and without holding any hearings or issuing any factual findings, the Congress amended the Solomon Amendment by adding equality in quality and scope language to the statute. Pub. No. 108-375 § 552, 118 Stat. 1811 (2004), codified at 10 U.S.C. § 983(b).

The Opinion Below

Petitioners brought this action against Donald H. Rumsfeld, in his capacity as Secretary of Defense on October 16, 2003 in the United States District Court for the District of Connecticut (the Hon. Janet C. Hall presiding) seeking a declaration that the DOD's actions had violated their rights under the First and Fifth Amendments to the United States Constitution and an order enjoining defendant Rumsfeld from further threatening Yale University with financial reprisals under the authority of the Solomon Amendment.

The DOD moved to dismiss petitioners' complaint in January 2004, arguing under Fed. R. Civ. P. 12(b)(1) that petitioners lack standing and that petitioners' claims are not ripe, and arguing under Fed. R. Civ. P. 12(b)(6) that petitioners' complaint failed to state a cause of action. Judge Hall denied defendant's 12(b)(1) motion on June 9, 2004, deferring defendant's 12(b)(6) motion to a hearing on petitioners' summary judgment motion. (App. C19.) Petitioners moved for summary judgment on April 8, 2004. After comprehensive briefing, the submission of extensive testimonial and documentary evidence, and oral argument in

December 2004, Judge Hall granted petitioners' motion for summary judgment on January 31, 2005, declared the Solomon Amendment unconstitutional as applied and enjoined defendant Rumsfeld from enforcing the Amendment to suppress - application of the Law School's Nondiscrimination Policy to the DOD. (App. A58-59.)

Respondent Rumsfeld filed his notice of appeal in the United States Court of Appeals on April 1, 2005. (App. D-1.) Petitioners filed this petition for certiorari on April 22, 2005 in light of respondent Rumsfeld's decision to seek certiorari in the related *FAIR* case.

In analyzing petitioners' claims and respondent's opposition, Judge Hall first correctly applied this Court's long settled law of unconstitutional conditions. (App. A31.) Relying on this Court's decisions in *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Speiser v. Randall*, 357 U.S. 513 (1958), Judge Hall accepted as her major premise that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially his interest in freedom of speech". (App. A32.) Judge Hall correctly rejected respondent's argument, made here and in the *FAIR* petition, that the Solomon Amendment may be justified merely because it is an exercise of the spending power. (*Id.*) Virtually all unconstitutional condition cases involve an exercise of the spending power. Indeed, the unconstitutional conditions doctrine is a constitutional limitation on congressional exercise of the spending power. (App. A32-33.)

Respondent's argument that Yale's decision to accept federal funds immunizes the Solomon Amendment from constitutional scrutiny is likewise foreclosed by this Court's unconstitutional conditions decisions. The central purpose of the unconstitutional conditions doctrine is to prevent the government from imposing conditions that burden First Amendment rights on funds that private parties choose to

accept in order to free those parties from the burden imposed by the condition. Respondent's "voluntary choice" argument would insulate all such offending conditions from constitutional scrutiny. Any such argument is inconsistent with the central purpose of the unconstitutional conditions doctrine.

Judge Hall went on to find—correctly—that the record established that the purposes for which the federal grants to Yale University were made were unrelated to the purposes of the Solomon Amendment, and that the amount involved—some $300,000,000—was sufficiently large that the "coercion [was] well past the point of pressure and is compulsion," relying on this Court's decisions in *South Dakota v. Dole*, 483 U.S. 203 (1987), and *Rust v. Sullivan*, 500 U.S. 173 (1991). (App. A33.)

Judge Hall next found that the condition imposed on petitioners by the Solomon Amendment constituted a violation of their constitutionally guaranteed rights of freedom of speech. (App. A34-48.) Judge Hall identified two different ways in which the Solomon Amendment infringed petitioners' freedom of speech. First, Judge Hall noted that the First Amendment conferred on petitioners the right to refrain from speaking. Relying, *inter alia*, on this Court's decisions in *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Pac. Gas & Elec. v. Public Util. Comm'n of California*, 475 U.S. 1 (1986), the court held: "the First Amendment guarantees both the right to speak freely and the right to refrain from speaking at all" (citations omitted) (App. A-35.) The court then found that the act of recruiting constituted an act of speech and that the military's use of CDO services under threat of financial coercion constituted assistance sufficient to constitute an infringement of the compelled speech doctrine, relying, *inter alia*, on this Court's decisions in *Pacific Gas & Electric*, *supra*, and *United States v. United Foods, Inc.* 533 U.S. 405 (2001). (App. A35-41.)

The court also found that the Solomon Amendment infringed petitioners' First Amendment rights by coercing a modification in the message petitioners sought to convey through their Nondiscrimination Policy. (App. A38-41.) Rather than proclaiming that discrimination on the basis of sexual orientation is categorically unacceptable, the Nondiscrimination Policy now contains an exception, imposed by coercion, embodying the assumption that gays and lesbians are not fit to serve in the armed forces.

Finding that the Solomon Amendment directly burdened freedom of speech, Judge Hall proceeded to apply the strict scrutiny test and asked whether the Solomon Amendment served a compelling governmental interest by the least restrictive means available. (App. A41-48.) Unlike the *FAIR* case, Judge Hall had before her a developed and closed record which permitted her to analyze those questions on the basis of a comprehensive description of recruiting at the Yale Law School. (App. A15-16, A20-24, A29-30.)

Accepting that military recruitment served a compelling governmental interest, Judge Hall proceeded to conclude that the DOD had not established that it had used the least restrictive means available. (App. A44-48.) Relying on its earlier discussion of the limited role played by the CDO in providing access to Yale students, the court concluded that the DOD had not offered any evidence that access to the CDO in precisely the same fashion granted to nondiscriminating employers is necessary for military recruiting. (*Id.*) As shown above, the military was provided with information that would allow it to contact all Yale law students, distribute promotional material, and schedule interviews at the same time and same place as other employers. The court also noted that the armed forces had and utilized other tools of recruitment, such as radio and television advertisements and student loan repayment programs, not available to civilian employers. (App. A45-46.)

Finally, the court noted that the record before it contained evidence as to the military's experience in recruiting at the Yale Law School during periods when the Nondiscrimination Policy applied to military recruiters and during the years 2002 – 2004 when the Policy was suspended. The court noted that during the period of suspension, the military had hired one Yale law student and that hiring had been accomplished without using the services of the CDO. (App. A46.) Based on this evidence, the court concluded that the DOD had failed to show that its coerced conscription of CDO services was necessary for military recruiting purposes.

Petitioners also argued that the Solomon Amendment violated petitioners' First Amendment right to freedom of association. Petitioners argued that the faculty of the Yale Law School constitutes an expressive association; that they had expressed certain core values of their association in adopting the Nondiscrimination Policy and requiring that any employer seeking to use the CDO's services subscribe to that policy; and that the use of CDO services by military recruiters to practice their discriminatory recruitment practices conflicted with those core values.

Petitioners also argued that the Solomon Amendment infringed their rights of academic freedom guaranteed by the First and Fifth Amendments to the Constitution. Petitioners claim that the decisions of this Court have long recognized that the constitutional guarantee of academic freedom encompasses their freedom to structure their students' educational environment in whatever manner best accomplishes their educational objectives; that their constitutionally guaranteed freedom includes the right to protect their students from all acts of discrimination within that environment; and that the Solomon Amendment conflicts with their right of academic freedom by subjecting their students to acts of discrimination under Law School auspices.

Petitioners also claim that their constitutionally protected freedom of association protects their collective decision both to embrace the principle that discrimination on the basis of sexual orientation is unacceptable, and to express their view by actions to disassociate themselves from and thereby disapprove, any employer that discriminates against gays and lesbians. The First Amendment protects not only petitioners' actions in formulating and adopting the Nondiscrimination Policy, but also their decision to disassociate from, to refuse to cooperate with, any employer that discriminates against their gay and lesbian students. Petitioners' withholding of the assistance of the CDO from the military's discriminatory recruitment practices is itself protected by petitioners' right of freedom of association. The DOD's threats of massive financial sanctions to coerce petitioners to provide assistance to those discriminatory practices constitute a violation of that constitutionally protected right.

In her carefully reasoned opinion, Judge Hall decided that under applicable authority the Yale Law School was an expressive association and that in the Nondiscrimination Policy the Law School had asserted the values it chose to live by. (App. A51.) Judge Hall went on to note that this Court's precedents counsel "great deference to an association's view of what would impair its expression", quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (internal quotations omitted), and relying upon *Dale* and *Hurley v. Irish American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995).[1] (App. A51.) Judge Hall went on to find that

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[1] Petitioners reject any notion that the *Dale* or *Hurley* cases suggest that educational institutions may discriminate against gays and lesbians. Nor is there any reason to doubt that the federal government is empowered to condition its grants for the purpose of eliminating discrimination. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Grove City College v. Bell*, 465 U.S. 555 (1984). However, on any fair reading of the *Dale* and *Hurley* cases, the breadth of the right

the Yale Law School "through its NDP and its policy that employers cannot utilize the CDO without subscribing to the NDP . . . seeks to express the idea that employment discrimination based on sexual orientation, even if done by the military, is wrong". (App. A53.) Judge Hall also found that the Yale Law School "also makes clear that it believes giving military recruiters access to the CDO . . . substantially affects its ability to advocate its chosen message opposing employment discrimination . . . ." (*Id.*) The District Court concluded that: "[w]hen viewed in conjunction with the high level of deference afforded to organizations by the Supreme Court in *Dale* . . . it becomes obvious that the Solomon Amendment substantially interferes with the Faculty Members' ability to advocate their viewpoint". (App. A53-54.)

Although relying primarily on its analysis of deference due to the governance decisions of expressive associations, the District Court acknowledged petitioners' argument that cases such as *NAACP v. Claiborne Hardware Co.*, 453 U.S. 886, 913 (1982) "guarantee [a] private institution's right not to associate itself with an entity whose explicit policies conflict with the private party's institutional values". (App. A48.) The Court also recognized, thought it did not rely upon, petitioners' argument that "the deference . . . accorded expressive associations would appear to be particularly appropriate in the university setting, in light of the Supreme Court's 'traditional giving of deference . . .' to universities because they 'occupy special niche in our constitutional tradition'" citing *Grutter v. Bollinger*, 539 U.S.

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of disassociation articulated there clearly encompasses petitioners' right to disassociate from the military's discriminatory recruitment activities. Having defined the scope of the First Amendment to encompass a private association's right to disassociate from gays and lesbians, the federal courts cannot logically or fairly apply an inconsistent, restrictive reading of the First Amendment to deny petitioners' right to disassociate from those who would discriminate against their gay and lesbian students.

306, 328-29 (2003) and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 319 n. 53 (1978), among others. (App. A52, n.29.)

Judge Hall concluded:

> ". . . the Solomon Amendment is hereby declared unconstitutional as applied, and the defendant is enjoined from enforcing it against Yale University based upon Yale Law School's Nondiscrimination Policy."
>
> App. A59.

REASONS FOR GRANTING REVIEW

This Court should grant certiorari to review this case for the same reasons respondent Rumsfeld urges this Court to grant certiorari to review the decision in *FAIR*. Respondent advances two principal reasons for this Court to grant certiorari in the *FAIR* case: (1) the court below declared an Act of Congress unconstitutional; and (2) the DOD asserts that the lower court's preliminary injunction will interfere with military recruiting. (FAIR Petition, p. 9-11.)

Both reasons equally warrant the grant of certiorari in this case. Judge Hall has handed down a final judgment declaring the Solomon Act unconstitutional and enjoined its enforcement. This case is better suited for adjudication of the issues raised by respondent in the *FAIR* case because this case involves a final judgment based on a closed factual record, whereas disposition of the *FAIR* case, which is at the preliminary injunction stage, by this Court will most likely result in a remand for further factual proceedings rather than a final determination of the important constitutional issues raised by the decisions below.

There is an additional compelling reason to grant certiorari in this case, not argued by respondent Rumsfeld in the *FAIR* case. If Judge Hall's constitutional analysis is

sound, this case involves a serious infringement by the Federal government of academic freedom and the right of private associations to speak and act in opposition to governmental policy on an issue of profound public importance. The DOD's recent aggressive enforcement of the Solomon Amendment has succeeded in suppressing the protest by disassociation by the nation's law school community against the military's anachronistic discrimination against gays and lesbians. That is reason enough for immediate review of the decision below.

I. THIS CASE IS A MORE SUITABLE VEHICLE FOR REVIEW OF THE ISSUES RAISED BY RESPONDENT RUMSFELD AS PETITIONER IN THE FAIR CASE.

Respondent Rumsfeld has urged this Court to grant certiorari in the *FAIR* case, despite the fact there is no final judgment, because the *FAIR* court calls into question the constitutionality of the Solomon Amendment and because respondent asserts that the proposed preliminary injunction will significantly interfere with military recruiting. Both of these reasons are of course equally applicable to this case. Indeed, this case is actually better suited to this Court's review of the serious constitutional issues raised. In contrast to the *FAIR* case, this case involves a final judgment on a closed factual record.

At the end of the day, resolution of this case may well turn on whether the Solomon Amendment is narrowly tailored to achieve the government's interest. Resolution of that question will depend, in turn, on the effect nonenforcement of the Solomon Amendment will have on military recruiting. Petitioner's arguments on that issue in the *FAIR* case are wholly devoid of any relevant empirical fact. Lacking a factual record, petitioner relies solely on: (1) its common sense; and (2) the fact that Congress, without any legislative hearings or findings, amended the Solomon

Amendment in 2004 to make it more onerous. (*FAIR* Petition at p. 3-5.)

The record below in this case contains a detailed description of the facts relevant to recruiting at the Yale Law School and the military's experience in recruiting during periods when the military was affected by the Law School's Nondiscrimination Policy and periods when the military was exempt from that policy. Importantly, the record below reveals that military recruiters had access, at all times, to Yale law students and to all the information necessary for recruitment—facts which are critically relevant to any informed assessment of whether the Solomon Amendment is narrowly tailored to achieve the government's purposes.

II. RESPONDENT'S RECENT AGGRESSIVE ENFORCEMENT OF THE SOLOMON AMENDMENT IS A GRAVE, ONGOING VIOLATION OF THE FREEDOM OF SPEECH AND ASSOCIATION OF THE NATION'S LAW SCHOOLS.

The struggle by our gay and lesbian citizens for equal respect and dignity is one of the central public issues of our time. In recent decades, our gay and lesbian citizens have made significant strides in their progress from an identity which dare not speak its name to acceptance by schools, places of business, and houses of worship. They nevertheless remain, they may be the last, identifiable minority which is subject to overt prejudice and discrimination.

The Yale Law School was among the first to grant gays and lesbians the dignity of equal respect when the faculty extended to them the protections of its Nondiscrimination Policy in 1978. Petitioners apply the Nondiscrimination Policy not only to govern their internal affairs, but also to express their opposition to any employer that discriminates against their gay and lesbian students. The Law School expresses its opposition by means which have

long been recognized as an integral part of the freedom of association protected by the First Amendment. In *Claiborne*, *supra*, this Court held that the NAACP's action in disassociating from, and organizing a boycott of, merchants that discriminated against African Americans was protected by the First Amendment. The very same principle protects petitioners' decision to disassociate themselves from, and thereby to disapprove, any employer that discriminates against gays and lesbians.

The importance of such action by private associations to the democratic nature of our civil society has been recognized from the time of Alexis de Tocqueville. In the nineteenth century, public actions by churches such as the Quakers made an enormous contribution to the growth of the abolition movement.

Similarly, the actions by the nation's law schools since the 1970s, first by insisting on equal respect for gay and lesbian students on their campuses, and later by requiring that any employer seeking their assistance provide their gay and lesbian students with equal respect, have made an important contribution to fostering their acceptance by the legal profession.

The collective insistence of the nation's law school community that discrimination against gays and lesbians is unacceptable has had profound effects. It is in no small part due to that insistence that today, it is unheard of for any major law firm to publicly treat gay and lesbian lawyers in a discriminatory fashion. In recent memory, only respondents have so discriminated against gays and lesbians as to warrant denial of access to the services of CDO at the Yale Law School.

Until very recently, the nation's law school community responded to the military's anachronistic discrimination against gays and lesbians by exercising their First Amendment right to disassociate themselves from, and

to thereby disapprove, the military's discriminatory recruitment and employment practices. That opposition, that protest has now been effectively suppressed. Virtually all of the nation's law schools have been forced to abandon their opposition by disassociation from the military's discriminatory practices by the DOD's recent aggressive threats of financial sanctions.

This Court should grant petitioners' application for certiorari now to resolve the serious constitutional issues raised by the DOD's suppression of the law school community's opposition to military discrimination against gays and lesbians.

III. PETITIONERS HAVE SATISFIED THE REQUIREMENT OF RULE 11

Rule 11 authorizes this Court to grant certiorari prior to decision by the Court of Appeals where a case is of such public importance as to justify departing from conventional appellate practice. The considerations of urgency that impelled respondent Rumsfeld to seek certiorari in the FAIR case are even more compelling in this case and warrant immediate review. Judge Hall has declared the Solomon Amendment unconstitutional and enjoined its enforcement. Respondent argued in *FAIR*: "the case is in a posture that is suitable for the Court's review because it presents important legal questions that do not depend for their resolution on further factual development." (FAIR Petition at 25.) That is even more true of this case, given the presence of a closed record. Moreover, the legal issues raised in this case are particularly suited for decision by this Court as opposed to a court of appeals. Since this Court has a fully developed body of precedent dealing with the constitutional issues raised by this case, it is hard to imagine that any useful purpose will be served by waiting for another circuit court decision. The DOD's effective suppression of the nation's law schools' opposition to military discrimination against gays and

lesbians presents an issue of such imperative public importance as to warrant exercise of the authority conferred by Rule 11.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari before judgment should be granted.

RESPECTFULLY
SUBMITTED,

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